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No. _____

IN THE

Supreme Court of the United States

October Term, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITION

Respondent, Indiana Department of State Revenue ("Department") does not accept the question as it is presented by Petitioner, Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier"). The question presented is:

May a State, consistent with the Commerce Clause of the United States Constitution impose a tax upon income derived from the sale of tax benefits relating to property located in Indiana?

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INDIANA DEPARTMENT OF STATE REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari ("Petition") filed by Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier") seeks review of a 5-0 decision of the Supreme Court of Indiana. That decision held that Indiana's Tax Court correctly decided that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) governed this case. The Court examined the unique facts of this case involving interstate sale of tax benefits and determined that the tax imposed complied with the four-part test set forth in *Complete Auto*. The imposition of the tax and application of *Complete Auto* was consistent with this Court's view of the application of *Complete Auto* as set forth in *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 603 (1989).

This opposition is based on two grounds:

1. The decision in this cause is fact sensitive, but the Indiana Supreme Court's answer to the question presented comes within the well established standards for permitted taxation. No new substantial issue which requires novel or extensive argument is presented.

2. The key question on which the decision of the cause depends has been previously determined by this Court and the opinions below properly apply this Court's precedent.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-11a)[1] is reported at *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev.*, 572 N.E.2d 481 (Ind. 1991). The opinion of the Indiana Tax Court (App. 12a-25a) is reported at *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Rev.*, 528 N.E.2d 867 (Ind.Tax 1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I. § 8, cl. 3, provides in pertinent part that "The Congress shall have power . . . to regulate Commerce . . . among the several states . . . ."

Indiana Gross Income Tax, Ind. Code § 6-2.1-2-2, provides in pertinent part:

> (a) an income tax, known as the gross income tax, is imposed upon the receipt of:
>
> (1) The entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana. . . .

Indiana Gross Income Tax, Ind. Code § 6-2.1-3-3 provides:

> Gross income derived from business conducted in commerce between the state of Indiana and either another

[1] "App." refers to the Appendix to the Petition.

state or a foreign country is exempt from gross income tax to the extent the State of Indiana is prohibited from taxing that gross income by the United States Constitution.

This case concerns the application of Ind. Code §§ 6-2.1-1-2, 6-2.1-2-2(a), 6-2.1-3-3 and of Ind. Admin. Code tit. 45 r. 1-1-49 and 1-1-51, reprinted at App. 28a-33a as applied to the proceeds of a sale of tax benefits.

STATEMENT OF THE CASE

Petitioner is an Indiana corporation that owned and operated the Merom Generating Station, a coal fired electric generating facility in Sullivan County, Indiana. Petitioner's only commercial domicile is Indiana. In 1982, Hoosier sold its rights to claim certain federal income tax benefits. The tax benefits consisted of accelerated cost recovery deductions and investment tax credits relating to and inseparable from personal property located at the Merom Generating Station.[2] The sale was facilitated by New York investment bankers.

The Supreme Court of Indiana's opinion sets forth the facts regarding the sale of the safe harbor transactions.[3] Respondent incorporates by reference the facts as stated in the opinion below. The Supreme Court of Indiana thoroughly examined the sale of the tax benefits in light of the Commerce Clause and the *Complete Auto* tests as well as other decisions of this Court.[4]

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[2] The property consisted of petitioner's right to claim federal income tax accelerated cost recovery allowances and investment tax credits, which, pursuant to the "safe harbor leasing" provisions of § 168(f)(8) of the Internal Revenue Code, 26 U.S.C. § 168(f)(8), could be sold to other corporations by a taxpayer that had sufficient federal taxable income to be able to use the tax benefits productively.

[3] App. A to Petition at 2a-3a.

[4] App. A to Petition at 6a-10a.

REASONS FOR DENYING PETITION

I.
THE SUPREME COURT OF INDIANA MADE A FACT-SPECIFIC DETERMINATION THAT COMES WITHIN THE STANDARDS FOR PERMITTED TAXATION IN ACCORDANCE WITH ANY DECISION OF THIS COURT OR STATE COURT OF LAST RESORT

While the issue of interstate commerce and the protection from state taxation which Art. I, § 8, cl. 3 of the United States Constitution provides is unquestionably an issue of substance, in the context of this particular case the issue which Hoosier seeks to have argued is not. This Court has stated the terms and guidelines upon which state taxation of activities within the general flow of interstate commerce will be permitted. This instance of state taxation comes within the standards for permitted taxation, and no substantial issue which requires extensive or novel argument has been raised.

The requirements to sustain the tax are that it is: (1) applied to activity with a substantial nexus with the State; (2) fairly apportioned; (3) not discriminatory against interstate commerce; and (4) fairly related to the services provided by the State. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959), see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

The Supreme Court of Indiana properly applied the precedents of this Court to the facts before it. Hoosier's suggestion notwithstanding, there is no conflict between the Supreme Court of Indiana's application of precedents of this Court to the facts before it and the application by other state courts of those same precedents to the facts before them.

II.
THE SUPREME COURT OF INDIANA FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES BEFORE IT

Hoosier's attacks on the Indiana Supreme Court decision with regard to "unitary business" and the "Due Process Clause" are misplaced.[5&6] Neither issue, although remotely related,is germane to the outcome of this case.

The Department's imposition of Gross Income Tax on the monies received by Hoosier from the sale of intangible tax benefits complies with the Due Process Clause of the United States Constitution. A transaction that a state seeks to impose tax upon must be within the state's taxing power or jurisdiction. This Court in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267 (1940) stated, ". . . [T]he simple but controlling question is whether the state has given anything for which it can ask return." This Court concluded that irrespective of the fact that the tax was contingent upon events which transpired outside the State, the substantial privilege of carrying on a business in Wisconsin supported the imposition of the tax. *Id.* 311 U.S. at 444-445.

A state seeking to impose its tax on proceeds from activity in interstate commerce must establish a connection or nexus between the exertion of its taxing power and any benefits which it has conferred upon the one sought to be taxed. Indiana has asserted nexus or jurisdiction to tax herein and Hoosier has not contested the assertion.

The Indiana Supreme Court applied the *Complete Auto* test to the case at bar. Notwithstanding, Hoosier's criticism of both Indiana's Tax Court and Supreme Court for adopting the *Complete Auto* test, this Court has continued to recognize Justice Blackmun's test and recently affirmed and applied the same in

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[5] See Petition at 14.

[6] See Petition at 17.

Goldberg v. Sweet, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989).

This Court in *Goldberg* decided that a tax on interstate telecommunications imposed by the State of Illinois did not violate the Commerce Clause. *Id.* 109 S.Ct. at 585. This Court's analysis employed the *Complete Auto* test. This Court found:

> Since the *Complete Auto* decision [1977] we have applied its four-prong test on numerous occasions.[12] We now apply it to the Illinois tax.

Id., 109 S.Ct. at 588.

In reviewing the procedural history of Goldberg, this Court stated:

> It [the trial court] found that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and its progeny control this case. *Under the four-prong test originated in Complete Auto, a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the service provided by the State."* Id., at 279, 97 S.Ct. at 1079.

(Emphasis added.) *Id.*, 109 S.Ct. at 587.

All parties to the *Goldberg* case had agreed that the first prong of the test had been satisfied because the Illinois tax on interstate telecommunications was being applied to an activity having *substantial nexus* with the State of Illinois, *Id.*, 109 S.Ct. at 588.

The Indiana Supreme Court likewise concluded that the first prong of the *Complete Auto* test was satisfied in the case at bar.[7] Specifically, concluding: " . . . [T]he intangible which was sold, federal income tax benefits, cannot exist separate and apart from the taxpayer and property which, with the aid of

[7] See App. A to Petition at 7a.

IRC § 168(f), created the intangible. . . ." *Hoosier Energy Rural Elec. Coop., Inc. v. Ind. Dept. of State Revenue, supra*, 572 N.E.2d at 485.

This Court in *Goldberg* began its inquiry with apportionment, the second prong of the *Complete Auto* test. The Appellants had argued that the telecommunications tax was not fairly apportioned because Illinois taxed the gross charge of each telephone call pursuant to their statute. *Goldberg v. Sweet, supra*, 109 S.Ct. at 588.

This Court responded to the parties' contentions and stated:

> In analyzing these contentions, we are mindful that *the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.* See, e.g., Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983). But "*we have long held that the Constitution imposes no single [apportionment] formula on the States,*" Id. at 164, 103 S.Ct. at 2939, *and therefore have declined to undertake essentially legislative task of establishing a "single constitutionally mandated method of taxation.*" Id. at 171, 103 S.Ct. at 2943; see also Moorman Mfg. Co v. Bair, 437 U.S. 267, 278.280, 98 S.Ct. 2340, 2347-2348, 57 L.Ed.2d 197 (1978). *Instead we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.* Scheiner, 483 U.S., at ____, 107 S.Ct. at ____; Armco Inc. v. Hardesty, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540 (1984); Container Corp., supra, 463 U.S. at 169-170, 103 S.Ct. at 2942-2943.

(Emphasis added.) *Id.* "To be internally consistent, . . . a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result." *Id.*, 109 S.Ct. at 589. This Court concluded that the Illinois Tax Act at issue was internally consistent because if every state only taxed the interstate calls charged to an in-state service address, only one state would tax each interstate call. *Id.*

The contentions of the Appellant in *Goldberg* are not unlike those of Hoosier in the case at bar. Hoosier's challenge to Indiana's Gross Income Tax Act is that the tax thereby imposed is not apportioned. The Code provides under IC 6-2.1-1-2(a):

> . . . 'gross income' means all the gross receipts a taxpayer receives:
>
> * * *
>
> (3) from the sale, transfer, or exchange of property, real or personal, tangible or intangible. . . .

The Indiana Code further provides under IC 6-2.1-2-2(a):

> An income tax, known as the gross income tax is imposed upon the receipt of:
>
> (1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana. . . .

In applying the internal consistency test enunciated in *Goldberg*, we must focus: "on the text of the challenged statute and hypothesize a situation where other States have passed an identical statute" to be certain that the tax is fairly apportioned pursuant to the *Complete Auto* test. *Goldberg v. Sweet*, *supra*, 109 S.Ct. at 589.

When we apply the internal consistency test of *Goldberg* and therefore hypothesize other states passing an identical statute, each state would only tax the gross receipts from the sale of tangible or intangible property of its domiciliary corporations. Clearly, if all states were to tax according to Indiana's structure, only Indiana could tax the receipts at issue. When only one state can impose tax on income receipts there is obviously no risk of multiple taxation.[8]

This Court in *Goldberg* rejected an argument that the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), dictated a different standard for the internal consistency test. *Goldberg v. Sweet*,

[8] See App. A to Petition at 8a.

supra, 109 S.Ct. at 589. The Appellant contended that, under *Armco*, a court must compare the challenged tax to similar, but not identical, taxes imposed by the other states. This Court responded:

> . . . Sprint misreads Armco. If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of State taxes would turn solely on "the shifting complexities of the tax codes of 49 other States." Armco, supra, 467 U.S. at 645, 104 S.Ct. at 2624; see also Moorman, supra, 437 U.S. at 277, n. 12, 98 S.Ct., at 2346, n. 12. In any event, to the extent that other States have passed tax statutes which create a risk of multiple taxation, we reach that issue under the external consistency test. . . .

Id. Citing to *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169-170, 103 S.Ct. 2933, 2942-2943, 77 L.Ed.2d 545 (1983), this Court affirmed:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. . . . We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

Goldberg v. Sweet, *supra*, 109 S.Ct. at 589.

Herein an examination of the in-state business activity which triggered Hoosier's taxable event was Hoosier's ownership of "qualified property" located in Merom, Indiana. Such property gave rise to the intangible tax benefits which were sold by Hoosier pursuant to 26 U.S.C. § 168(f)(8).

Similarly, this Court in *Goldberg* recognized that the retail purchase of the interstate calls was not a purely local event because activities were triggered in several states. Nonetheless, this Court rejected Appellant's argument that many states could assess a tax on the gross charge of an interstate phone call. In so doing, this Court called into doubt sufficient

nexus on the part of any other state to tax the activity. *Id.* 109 S.Ct. at 589-590. Although this Court in *Goldberg* did recognize the limited possibility of multiple taxation under the facts therein, it stated that such limited possibility was not sufficient to invalidate Illinois' statutory scheme. *Id.* 109 S.Ct. at 590.

In the case at bar, the issue is not whether the tax has a legislatively apportioned-type structure. The Indiana Gross Income Tax does not. The issue is, regardless of the tax structure, does the imposition of the tax in question warrant apportionment between the State of Indiana and any other state.[9]

The focus in this case cannot be on where the agreements were negotiated or executed or the number of hours it took Hoosier to execute the contracts and receive the monies. The focus must instead be on the activity which generated the income. The income was from a sale of intangible tax benefits. The intangible tax benefits which were sold were based upon Hoosier's tangible personal property located in Indiana by operation of federal law. Therefore, just as this Court in *Goldberg* did not require Illinois to apportion its tax on the gross charges of the interstate phone calls at issue, the Indiana Supreme Court correctly ruled that Indiana was entitled to tax the gross receipts received by Hoosier without apportioning the same to any other state.

The Supreme Court of Indiana applied the correct and long established legal standard to the unique factual record of this case. Its resulting unanimous decision was a proper application of the *Complete Auto* test consistent with *Goldberg v. Sweet*, *supra*, which allows taxing of Hoosier's sale of its federal income tax benefits within the parameters of the United States Constitution.[10] Petitioner's claim that the Supreme Court of Indiana incorrectly applied this Court's precedent is in error and does not merit review by this Court.

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[9] See App. A to Petition at 8a.

[10] See App. A to Petition at 9a.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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